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Supreme Court of the United States

October Term, 1960

No. 514

MICHAEL STONE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction on two counts of an indictment charging violations of Sec. 152; Title 18, U. S. C., but finding that the Trial Court committed prejudicial error which would necessitate a reversal of the conviction on Count 1 of the indictment, if that count stood alone.

(a) The Opinions Below

The opinions of the Courts below have not been officially reported. Said opinions have been duly certified by the United States Court of Appeals for the Second Circuit, and are being submitted herewith.

(b) Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on the 18th day of July, 1960.

2. Timely application for rehearing was made on August 1, 1960, and was denied on October 3, 1960.

3. Jurisdiction of this Court is invoked pursuant to 18 U. S. C., Rule 37, and 28 U. S. C., § 1254.

(c) Questions Presented for Review

1. Whether the Court of Appeals erred in finding that the prejudicial error committed by the Trial Court in refusing to make the grand jury minutes available to the defendant did not carry over to Count 2 of the indictment.

2. Whether the Court of Appeals erred in finding that there was sufficient evidence to support the conviction of the defendant on Count 2 of the indictment.

~~"Guilty". This, too, with a jury of some women and men, some of the women living and having to go home to the Bronx at that time of night.~~

(d) Statutes and Rules Involved

Title 18, United States Code, Section 152. *Concealment of assets; false oaths and claims; bribery:*

> "Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or
>
> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever, knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

(e) Statement of Case

"STATEMENT OF FACTS

The first count of the indictment charges the defendant in substance with having unlawfully, wilfully, knowingly and fraudulently concealed 1823 dresses belonging to the bankrupt estate of Ellen Joan Fashions, Inc. from the Trustee in Bankruptcy of said corporation from on or about November 17, 1955 up to the date of the filing of the indictment. The second count of the indictment charges the defendant in substance with having knowingly and fraudulently made a false oath in a material matter on or about June 24, 1955 in the 'Statement of Affairs' filed by Ellen Joan Fashions, Inc., a corporation of which he was secretary, in failing to disclose that repayments of loans had been made by said debtor to defendant's wife, Anita Stone, during the year immediately preceding the filing of the petition for arrangement by Ellen Joan Fashions, Inc. (R. 542-546).

The case was tried before the Honorable Richard H. Levet, District Judge and a Jury (R. 1-541). The testimony adduced at the trial will be hereinafter discussed. The trial resulted in a verdict of guilty against the defendant on both counts of the indictment. An appeal was taken from the judgment and sentence (R. 600-602). The defendant was admitted to bail pending the outcome of his appeal, and said bail was continued by the Court of Appeals pending the outcome of the instant writ.

The pertinent evidence adduced by the Government at the trial may be summarized briefly as follows:

A petition for arrangement under Chapter XI of the bankruptcy Act was filed by the defendant on behalf of Ellen Joan Fashions, Inc. on June 24, 1955. Ellen Joan Fashions, Inc. continued to operate its business thereafter until November 17, 1955, at which time it was adjudicated a bankrupt and the New York Credit Men's Adjustment Bureau, Inc. was appointed Trustee (R. 21).

The first witness called on behalf of the Government, Louis M. Mintz, a certified public accountant, testified that he had served as the accountant for Ellen Joan Fashions, Inc. from approximately July, 1954 until the early part of 1955 (R. 24, App. 44a). This witness identified various of the books and records of Ellen Joan Fashions, Inc. and these books and records were then introduced in evidence (R. 25-36). Thereafter the Government introduced in evidence an inventory of Ellen Joan Fashions, Inc. as of January 31, 1955 through Rose Navon, a bookkeeper employed by Ellen Joan Fashions, Inc. (R. 69).

The next Government witness, David Freedman, a certified public accountant employed by the accounting firm of Simonoff, Peyser & Citron, testified that he performed an audit of the books of Ellen Joan Fashions, Inc. on behalf of the Creditors Committee of that corporation commencing in July, 1955 (R. 62, 63, App. 13a, 14a). Mr. Freedman testified that he had taken the inventory dated January 31, 1955 (Govt.'s Exh. 21) as a starting point and added to that dresses received from contractors of Ellen Joan Fashions, Inc. between February 1, 1955 and June 22, 1955 (R. 80, 81, App. 20a). From the resulting figure, he subtracted the number of dresses sold during this period (R. 85, App. 24a) after subtracting therefrom the dresses returned by customers during the same period (R. 86, App. 25a). The witness testified that after subtracting the number of dresses sold from the total computed as having been on hand, there were 1950 dresses to be accounted for (R. 87, App. 26a). From this figure, Mr. Freedman deducted the number of dresses on hand on June 24, 1955, leaving an alleged shortage of 1866 garments (R. 121, 122, App. 41a). Another witness, Milton Brahms, a certified public accountant employed by the firm of Simonoff, Peyser & Citron, was called during Mr. Freedman's testimony to testify as to the number of dresses which he computed to have been on hand at the place of business of Ellen Joan Fashions, Inc. on June 24, 1955 (R. 103, App. 30a) and it was his figure of 84 dresses which was incorporated into Mr. Freedman's computations.

Mr. Freedman also testified that he had examined the general ledger of Ellen Joan Fashions, Inc. and had found three payments made to Anita Stone by the corporation: $3,000.00 on July 19, 1954; $2,000.00 on March 25, 1955 and $220.00 on May 12, 1955, all of which payments were reflected in the cash disbursements book of Ellen Joan Fashions, Inc. (R. 113, 114, App. 34a). Mr. Freedman also testified as to an entry in the books of Ellen Joan Fashions, Inc. which was made on August 25, 1954 transferring $10,000.00 from the amount due to Anita Stone to paid in surplus (R. 113, App. 34a, 35a).

Mr. Freedman further testified that when he began his audit he was given the bank statements and cancelled checks of the corporation by the corporation's bookkeeper (R. 115, App. 37a) and three checks covering these payments were thereupon introduced in evidence as Government's Exhibits 25, 26 and 27 (R. 116, 117, App. 37a, 38a). This testimony given by David Freedman constituted the sum and substance of the Government's case against the defendant.

The Government's next witness, George Feldman, testified that he was Assistant Secretary of the New York Credit Men's Adjustment Bureau, Inc. and that said Bureau became Trustee on or about November 17, 1955 (R. 153). On cross-examination Mr. Feldman testified that during the period of arrangement between June 24, 1955 and November 17, 1955, there were four or five creditors' meetings held at the office of the New York Credit Men's Adjustment Bureau, Inc. lasting over a period of months and that the alleged shortage of merchandise was discussed with customers at these meetings (R. 160) and that these meetings began on or about June 30, 1955 (R. 162).

The Government's next witness, David Whitted, testified that he had been employed by Ellen Joan Fashions, Inc. from 1952 to the summer of 1955 as a packer and shipper (R. 171, 172, App. 53a). Mr. Whitted testified that during the period between

February 1, 1955 through June 24, 1955, he had delivered two shipments of dresses totaling a maximum of 125 dresses for which charge slips had not been prepared at the time of the delivery, and that these were the only occasions during this period on which he could remember deliveries having been made without charges (R. 180, 181, App. 57a, 58a).

Mr. Whitted was the only packer and shipper employed by Ellen Joan Fashions, Inc. (R. 172, App. 53a) and there was no other evidence of any shipments having been made by the firm during this period without charges.

On cross-examination it was shown that Mr. Whitted had delivered these dresses to known customers of Ellen Joan Fashions, Inc., that the deliveries had been made during business hours and that he had obtained receipts from the customers to whom the dresses were delivered (R. 184, 186, 187, 188, 193; App. 59a, 61a, 62a, 63a 65a). The witness also testified that he had no knowledge as to whether bills had been thereafter prepared for these customers or whether they had returned the merchandise (R. 185, App. 60a).

At no time during the trial did the Government introduce any testimony whatsoever to show that the books and records of Ellen Joan Fashions, Inc., which were in evidence, failed to reflect the transactions with respect to which Mr. Whitted had testified.

The testimony of the final Government witness, Eugene Whitwam, a special agent of the Federal Bureau of Investigation specializing in accounting work, was merely repetitive of the testimony given by David Freedman, the accountant employed by the Creditors Committee of Ellen Joan Fashions, Inc. Mr. Whitwam's analysis of the alleged shortage of dresses parallelled the analysis made by Mr. Freedman, except for the fact that Mr. Whitwam arrived at a shortage of 1823 dresses (R. 197, 198, App. 67a, 68a) instead of 1866.

Upon cross-examination, Mr. Whitwam testified that during his conversations with the defendant

prior to the trial, the defendant indicated that the alleged shortage of dresses could possibly be explained by the fact that there had been a number of thefts in the building occupied by Ellen Joan Fashions, Inc. (R. 204, 213, App. 68a, 69a, 71a).

Mr. Whitman also conceded on cross-examination that he had never found any proof whatsoever that any merchandise had been delivered or taken from Ellen Joan Fashions, Inc. without corresponding entries having been made in the books of that firm and that he had never heard that any proof of such nature had been obtained by anyone (R. 215, 216, App. 71a).

At the conclusion of Mr. Whitwam's testimony, the Government rested its case (R. 220) and a motion was made by the defendant to dismiss both counts of the indictment (R. 220 through 239), which motion was denied (R. 238, 239).

Anita Stone, the first witness called on behalf of the defendant, testified that during the period covered by the indictment she had been employed as a buyer for a dress concern in which she had no financial interest (R. 240, 241, App. 71a-73a). She further testified that although she was the president of Ellen Joan Fashions, Inc., she had nothing to do with the running of its business, except that from time to time she borrowed money from certain outside sources, on behalf of Ellen Joan Fashions, Inc. (R. 243, 244, App. 75a), that she had no money of her own to lend to the business (R. 247, App. 75a), and that all of the monies which she received from the firm went to repay the persons from whom the money had been borrowed (R. 245-246, App. 76a).

The defendant, Michael Stone, then took the witness stand on his own behalf. He denied that he had concealed any dresses or money from the creditors of Ellen Joan Fashions, Inc. or from the Trustee in Bankruptcy (R. 280, 281, App. 79a, 80a), or that he had knowingly and fraudently made false oath in the Statement of Affairs filed in the Matter of Ellen Joan Fashions, Inc., Debtor (R. 281-283; App. 80a, 81a).

The defendant further testified that the facts regarding the schedules were obtained from the books of Ellen Joan Fashions, Inc. and that they had been made up by its bookkeeper without any assistance from the defendant. He also stated that he believed that the information he received from the bookkeeper truly represented the condition of Ellen John Fashions, Inc. (R. 283; App. 81a, 82a). He then testified that his principal function on behalf of Ellen Joan Fashions, Inc. was the styling and selling of dresses which required him to travel out of town frequently (R. 289, 290, App. 85a, 86a).

On cross-examination, the defendant denied that 1800 dresses were missing in June of 1955, and further denied having admitted to the Grand Jury that the dresses were missing. Thereupon, in an attempt to impeach this testimony, the prosecuting attorney read the following question and answer from the testimony given by the defendant before the Grand Jury:

> 'Q. Now, at the time the petition was filed in June of 1955 a shortage of approximately 1860 dresses was found. A. Yes.
>
> Q. Do you recall that? A. Yes.' (R. 332, App. 87a.)

The defendant consistently denied that there was any actual shortage of dresses and this testimony given before the Grand Jury merely indicated that he had been advised by Mr. Freedman, the accountant for the Creditors' Committee, that a theoretical shortage of dresses had been 'found'. The prosecution referred to the Grand Jury minutes again at a later stage in the cross-examination of the defendant in an attempt to impeach his testimony (R. 342).

Defendant's counsel thereafter moved for permission to examine the Grand Jury minutes for the purpose of examining the testimony of the defendant to see what other testimony was given on the matters to which the prosecuting attorney had alluded (R. 362, 363, App. 89a), but the Court denied defendant's application (R. 364, App. 90a).

> On redirect examination, the defendant testified that the schedules which had been filed on behalf of Ellen Joan Fashions, Inc. on June 24, 1955 had been prepared by a stenographer in the office of his attorney from information which had been given to her by the bookkeeper employed by Ellen Joan Fashions, Inc. (R. 376, 377, App. 99a, 100a)."
>
> At the conclusion of the entire case, defendant's counsel moved to dismiss both Counts of the indictment which motion was denied (R. 389-392, App. 101a-104a).
>
> After the case had been submitted to the jury, the jury returned a verdict of guilty after almost seven hours of deliberation (R. 483). Thereafter, defendant's counsel made a motion to set aside the verdict (R. 490-512), which motion was denied in the opinion rendered by the Court (R. 551-570, App. 141a-163a)."

Petitioner was sentenced to 18 months on each of Counts 1 and 2 to run concurrently. On appeal, the Court of Appeals affirmed the judgment of the District Court and a petition for rehearing was denied.

(f) Jurisdiction of the Courts Below

The District Court had jurisdiction under Title 18, U. S. C., Sec. 152.

The Court of Appeals had jurisdiction under Title 28, U. S. C., Section 1291.

(g) Reasons Relied On

As to Question 1:

Once the Court of Appeals found that the Trial Court had clearly committed prejudicial error in refusing defendant's request to examine his own testimony given before the grand jury, it appears clearly arbitrary for that Court to have determined that this error did not affect defendant's substantial rights with respect to Count 2 of the indictment.

In discussing the failure of the District Court to permit the defendant to inspect the Grand Jury minutes, the Court of Appeals stated that "We cannot be certain that this objective demonstration of the consistency of Stone's trial testimony with what he said before the grand jury would not have been far more effective than what the trial jury may have regarded as an invented and self-serving explanation." But in an other part of its opinion affecting the second count of the indictment the Court of Appeals stated that "* * * we cannot believe the oe error to which proper objection was taken, namely, the failure to make the grand jury minutes available, prejudicial as we hold this to have been with respect to Count 1, carried over to the wholly different transactions charged in Count 2 with respect to which the government had made no claim of inconsistent grand jury testimony." These statements by said Court must be read together and, if that is done, two things become apparent—(1) that the conclusion in the latter statement is merely one of belief, which denotes conjecture and surmise, rather than one of fair assurance or conviction; (2) that if the trial jury "may well have regarded Stone's trial testimony as an invented and self-serving explanation", as indicated in the former statement of the Court of Appeals, then it is just as reasonable to believe that this attitude affected its consideration not only of Count 1 of the indictment, but also of Count 2 of the indictment.

Petitioner respectfully submits that it cannot arbitrarily be said that once a jury has been given the impression that the defendant has been caught in a lie and has been confronted with apparently inconsistent testimony given before the Grand Jury, the trial jury will confine its conclusions with respect to defendant's credibility to the count of the indictment under which this seemingly inconsistent testmony has been introduced. As a matter of fact, any unfair attack upon defendant's

credibility and character must necessarily affect the jury's consideration of his entire testimony.

In its decision the Court of Appeals stated that the jury was warranted in rejecting defendant's explanation that the amounts recorded as loans by Mrs. Stone were, in fact, loans from various other persons for whom she acted as a conduit, and that the repayments also went to them. If the jury felt that petitioner had been successfully impeached with respect to his explanation of the apparent shortage of dresses, how can it be stated that they did not reject his explanation of the loans to Anita Stone upon the basis that his testimony had been found untrustworthy? In this connection, this Court's attention is called to the fact that the Trial Judge, in his charge, instructed the jury as follows:

> "*If any witness has wilfully testified falsely to any material fact, you may disregard all his testimony* or you may accept such part of it as you believe worthy of belief—as appeals to your reason or judgment. Remember always, it is the quality of the evidence that counts.
>
> *A witness may be discredited or impeached* by contradictory evidence; or *by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.*
>
> If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves." (R. 476, 477) (Italics ours.)

In view of this charge can it be stated with fair assurance that the jury may not have disregarded petitioner's entire testimony upon the basis that he had been impeached by evidence that at other times he had made statements which were seemingly inconsistent with his present testimony?

Furthermore, since fraudulent intent is an essential ingredient of the crime charged against petitioner, his general character and credibility must have been a factor affecting the jury's determination as to his guilt or innocence in that respect as well. It is to be noted that the jury deliberated for seven hours and requested a reading of petitioner's testimony before he was found guilty on both counts. Thus, even at the moment of final deliberation the jury was made once more aware of petitioner's seemingly inconsistent testimony before the Grand Jury.

In determining whether error committed by a trial court constitutes harmless error or prejudicial error, the courts often take into consideration the question as to whether the case is a doubtful or closely contested one, or one in which the guilt of the accused has been clearly established. In the instant case the Court of Appeals stated with respect to Count 1 of the indictment that "on the whole we think there was enough evidence to send County 1 to the jury * * * although barely so." With respect to Count 2 of the indictment, they stated that petitioner had made an argument "which is quite persuasive as regards the March 25 and May 22 payments", thereby leaving only the failure to disclose the $3,000 payment of July 19, 1954 to sustain the conviction. Then the Court of Appeals found that the trial court committed clearly prejudicial error in failing to make the Grand Jury minutes available to petitioner, which error would necessitate a reversal of the conviction on Count 1 of the indictment if that count stood alone. Petitioner submits, then, that in determining whether this prejudicial error affecting petitioner's substantial rights carried over to Count 2 of the indictment, the doubtful and closely contested nature of the case should also be taken into consideration.

This Honorable Court, in the case of *Kotteakos v. United States*, 66 S. Ct. 1239, at 1248; 328 U. S. 750, stated as follows:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were no affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Certainly, where the Court of Appeals has found that the prejudicial error may well have affected the trial jury's considerations, it cannot be said, with fair assurance, that this effect was limited to its consideration of Count 1 of the indictment only, and that the jury's judgment was not substantially swayed by the error in its consideration of petitioner's guilt or innocence with respect to County 2 of the indictment.

It is respectfully submitted, therefore, that since petitioner's conviction hangs upon such a slender thread, and since there are clearly demonstrable flaws even in this thread, it would be unfair to deny petitioner the right to a fair trial in which any unjust advantage obtained by the Government would be eliminated from the consideration of the jury.

As to Question 2:

Petitioner contends that the Government failed to prove that the answer to Item 10 of the Statement of Affairs was false, that the answer was material, that the answer affected a matter material to an issue which is itself material, and that it was an intentional untruth. It is respectfully submitted that the Government failed to establish any of these elements necessary to constitute perjury.

The Government's accountant, David Freedman, referred in his testimony to three alleged repayments by corporate check to Anita Stone on July 19, 1954, March 5, 1955, and May 12, 1955, in the sums of $3,000.00, $2,000.00 and $220.00, respectively. There was submitted by the Government through Mr. Freedman Government's Exhibit 22B which is marked "Loans Payable to Anita and Michael Stone—as at—June 24, 1955". This exhibit contains the following entries:

"February 1, 1954	Balance due to Anita Stone	$1,980.00
	Less — Balance due from Michael Stone	1,371.57
February 1, 1954	Net Balance due to Anita and Michael Stone	608.43"

There are then listed various loans to Ellen-Joan Fashions, Inc. by M. Stone and A. Stone. The first item is that of May 14, 1954 which represents a loan by Anita Stone in the sum of $10,000.00. In the same exhibit, under payments charged to the loan account, there appears under date of July 19, 1954 a payment to Anita Stone of $3,000.00. Reverting back to the side referring to loans to the corporation on Government's Exhibit 22B, we find the following statement: "Less Transferred to Paid in Surplus—August 25, 1954—$10,000.00". Mr. Freedman testified that this $10,000.00 was transferred from the amount due from Anita Stone to Paid in Surplus [R. 113, App. 34a, 35a], as reflected in the journal entry made in the books of the corporation, *leaving an amount due from Anita Stone to the corporation of $1,020.00.*

If this Exhibit which was created by the Government's accountant purportedly from the books and records of the Ellen-Joan Fashions, Inc. is examined in a realistic perspective as affecting the account of Anita Stone, then the conclusion is inescapable that the $3,000.00 which was paid

to Anita Stone on July 19, 1954 could not possibly have been termed a "repayment of loan" since the $10,000.00 loan which was made on May 14, 1954 was transferred intact to Paid in Surplus. This would have been impossible if the $3,000.00 had been applied in reduction of the original loan of $10,000.00. It is, therefore, apparent that the $3,000.00 must have been treated on the books as either a withdrawal or a loan to Anita Stone. In this connection, it is important to call this Honorable Court's attention to Question 14 appearing in the Statement of Affairs and the answer thereto, as follows [Govt. Exhibit 1]:

> "14. Withdrawals.
>
> a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original petition herein?
>
> As appear in the books and records."

The reading of the answer to Question 14 shows that the corporation directed the attention of the creditors to the books and records of account in order to obtain full information as to the nature of the transactions between Anita Stone and the corporation, since a clear explanation or statement cannot be made in answer to Question 10 by reason of the confusion which appears in the books and records affecting these items.

As a matter of fact, Government's Exhibit 22B, as prepared by Mr. Freedman purportedly from the books and records, is not a true analysis thereof because it refers to to a transfer to Paid in Surplus on August 25, 1954 of $10,000.00 without showing that this $10,000.00 was transferred from the Anita Stone account, as Mr. Freedman testified.

Another glaring example of the confusion created by Government's Exhibit 24 prepared by Mr. Freedman is the

item under date of July 19, 1954, "Repayment to A(nita) S(tone), Cash Disb., Page 113, $3,000.00" appearing in a column headed "Repayments to Anita Stone", whereas the cash disbursements book which is in evidence as Government's Exhibit 3, merely shows a payment to Anita Stone and does not indicate whether this is a repayment of a loan or whether it is a withdrawal or a loan to Anita Stone.

The foregoing analysis shows that it is entirely inconsistent to treat the payment of $3,000.00 as a repayment of a loan and to transfer to the Anita Stone Paid-in-Surplus account the amount of $10,000.00.

Without the accountant's description in Government's Exhibit 22B and Government's Exhibit 24 characterizing the payment of $3,000.00 to Anita Stone as "repayment" of a loan, which is contrary to the journal and ledger entries, there would be no evidence whatsoever that the $3,000.00 constituted a repayment of a loan, and it is for such reason that there was no evidence before the Court upon which to base a conviction for perjury.

A fortiori the two payments made thereafter to Anita Stone of $2,000.00 on March 25, 1955 and $220.00 on May 12, 1955 must have been loans or withdrawals and could not possibly have been repayments of loan, since at the time of these transactions the corporation did not owe her these sums of money. Even in his testimony at the trial, Mr. Freedman did not refer to these two transactions as "repayments" but designated them merely as payments to Anita Stone [R. 114, App. 35a]. However, it should be pointed out that Government's Exhibit 24 prepared by Mr. Freedman is utterly misleading since the $2,000.00 transaction of March 25, 1955 and the $220.00 transaction of May 12, 1955 are listed in a column which is headed "Repayments to Anita Stone", although these words do not appear in the corporate books.

In connection with these two payments to Anita Stone of $2,000.00 and $220.00, there is an additional reason for

finding that the Government failed to prove that appellant's answer to Question 10 contained in the Statement of Affairs was false. Government's Exhibit 22B treated the Michael and Anita Stone account as a unit, as did the corporate ledger for the period commencing February 1, 1955 [A. & M. Stone Account No. 18, general ledger, Government's Exhibit 2]. An examination of this account reveals that the debit items beginning with the first transaction on February 28, 1955 through the last transaction on April 30, 1955 total the sum of $4,440.00. This sum of $4,440.00 consists of the following items:

February 28, 1955	1,000.00
February 28	300.00
March 31	2,200.00
April 30	140.00
April 30	800.00

The item of March 31st in the sum of $2,200.00 encompasses the $2,000.00 paid to Anita Stone on March 25, 1955 together with the sum of $200.00 paid to Michael Stone on March 10, 1955, as shown on Government's Exhibit 22B. Adding to the sum of $4,440.00 the payment of $220.00 made to Anita Stone on May 12, 1955 [Government's Exhibit 22B], which does not appear in this account, we arrive at the sum of $4,660.00. This is the exact figure given by petitioner in answer to Question 10 in the Statement of Affairs as having been paid to him between February 28, 1955 and June 24, 1955, the date of the filing of the petition.

It is, therefore, apparent that petitioner included all of the items appearing in the A. and M. Stone Account as debits in his answer to Question 10 as payments to him, without regard to whether they were debited to himself or to his wife, Anita Stone, and that the total of $4,660.00 specifically included the $2,000.00 and $220.00 payments to Anita Stone. It is immaterial that petitioner listed them as payments to himself in view of the fact that both the Government and the accountant for the corporation are

parently treated the Anita and Michael Stone transactions as a unit.

Under the circumstances, the Government cannot claim to have proved that appellant's answer to Question 10 was false in that he failed to list these payments to Anita Stone since he included these payments to Anita Stone in said answer, despite the fact that they did not actually constitute repayments of loans.

In any event, the Government utterly failed in its attempt to prove that appellant knowingly and fraudulently gave a false answer in the Statement of Affairs since the proof offered by the Government indicates that at the very least there was extreme confusion as to the nature of the transactions entered in the books of the corporation. Petitioner has shown that these transactions did not constitute "repayments of loan" but constituted withdrawals or loans to Anita Stone and as such properly belong in the answer to Question 14, which refers to "withdrawals, including loans * * * made by officers of the corporation". Therefore the answer given "as appears in the books and records" would direct the attention of all interested persons to the payment made to Anita Stone.

It is convincingly clear that appellant did not intentionally withhold information in his answer to Question 10, and, in fact, included more information than was required of him.

The Court below found that petitioner had made "a quite persuasive" argument as regards two of the three payments made to Anita Stone which were the subject matter of this count of the indictment, but found that petitioner had no explanation of the failure to report the $3,000 payment of July 19, 1954 to Anita Stone.

It is respectfully submitted that said Court completely overlooked petitioner's argument that this $3,000 payment did not constitute a "repayment of loan" which peti-

tioner was required to list in answer to item 10 of the Statement of Affairs in the Chapter XI proceeding. There is no mention whatsoever in this Court's decision of petitioner's analysis of the testimony of the Government's principal witness, David Freedman, and of the books and records of the corporation which were introduced in evidence at the trial, showing that this payment to Anita Stone could not possibly have constituted a "repayment of loan".

Since the Court below virtually conceded that the two payments made on March 25 and May 22, 1955 to Anita Stone were sufficiently revealed in the Statement of Affairs so that they could not constitute a basis for petitioner's conviction, and since said Court stated that the conviction on Count 1 would have to be reversed because of the refusal to grant peitioner's request for the Grand Jury minutes of his testimony, it is apparent that petitioner's conviction is based solely upon his failure to set forth this $3,000 payment in answer to item 10 of the Statement of Affairs.

The affirmance of the judgment of conviction thus disregarded petitioner's argument that this transaction did not constitute a repayment, and that even if it did constitute a repayment, petitioner could not be convicted of having *knowingly and fraudulently* failed to list this transaction as a repayment, since the books and records of the corporation were, at best, confusing with respect to this item. Despite the fact that the Court of Appeals treated the $3,000 transaction as a repayment of loan to Anita Stone, it stated that it is entirely possible that if the disclosure of the March 25th and May 22nd repayments had been argued to the jury, the jury would not have found defendant guilty for failure to report a single payment made to Mrs. Stone nearly eleven months before. The implication of this statement is that, even if petitioner's answer in the Statement of Affairs were

false, the jury would not have found him guilty of having *knowingly and fraudulently* made such false statement with respect to a single remote transaction. If this Honorable Court accepts defendant's argument that this transaction did not constitute a repayment of a loan or, at the very least, that the transaction was so complex as to prevent petitioner from recognizing it as a repayment, then it will recognize that the jury *could* not have found the defendant guilty for failure to report this single payment.

Conclusion

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this honorable court.

Accordingly, the petitioner asks that this court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER.
Attorney for Petitioner.

Dated: New York, N. Y.
October 29th, 1960.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit on Appeal from Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 354—October Term, 1959.

(Argued June 10, 1960 Decided July 18, 1960.)

Docket No. 26088

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL STONE,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,
and HAND and FRIENDLY, *Circuit Judges*.

Defendant appeals from a judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge*, convicting defendant, after a jury trial, on both counts of an indictment which charged him with concealing property from a trustee in bankruptcy and making a false oath in and in relation to a bankruptcy proceeding, in violation of 18 U. S. C. § 152. Affirmed.

IRVING YOUNGER, Ass't U. S. Att'y (S. Hazard Gillespie, Jr., U. S. Att'y for the Southern Dist. of New York, and Otis Pratt Pearsall, Ass't U. S. Att'y, on the brief), *for Appellee.*

PALMER, MASIA & PALMER, New York, New York, *for Defendant-Appellant.*

FRIENDLY, *Circuit Judge*:

Michael Stone was engaged in the business of manufacturing and selling ladies' dresses. He did this through a corporation, Ellen-Joan Fashions, Inc. His wife Anita was the corporation's president, a director and sole stockholder; Michael was a director and had the title of secretary. In fact Anita performed no significant services for the corporation, which Michael, ran. On June 24, 1955, Ellen-Joan Fashions, Inc. filed a petition for an arrangement under Chapter XI of the Bankruptcy Act; on November 17, 1955, it was adjudicated a bankrupt and New York Credit Men's Adjustment Bureau, Inc., hereafter the Bureau, was appointed trustee.

On August 7, 1958, a grand jury in the Southern District of New York returned an indictment charging Michael Stone with two offenses under 18 U. S. C. § 152. The first count charked that Stone had knowingly and fraudulently concealed from the trustee "property belonging to the bankrupt estate of Ellen-Joan Fashions, Inc., to wit, 1,823 dresses of the approximate value of $14,555.57." The second count charged that Stone had knowingly and fraudulently made a false oath in, and in relation to, a bankruptcy proceeding in that the statement of affairs filed in the Chapter XI proceeding of Ellen-Joan, which he had verified, "failed to disclose that repayments of loans had been made by the said debtor to Anita Stone * * * whereas, in truth and in fact, as the defendant then and there well

knew, such repayments of loans to Anita Stone had been made by the said debtor." After deliberating for seven hours during which it requested the exhibits and a reading of Stone's testimony, the jury found defendant guilty on both counts. Judge Levet, in an opinion, denied a motion to set aside the verdicts. He imposed sentences of 18 months' imprisonment on each count, the two sentences to be served concurrently.

Defendant contends there was not sufficient evidence to warrant a conviction on either count. He complains also of the court's failure to require the government to make his testimony before the grand jury available to him after the government had cross-examined him in regard to it. Some of the points now most heavily relied upon by appellant's counsel were first made only after the verdict or even on appeal; under Fed. R. Crim. Proc. 52(b), we have thought it our duty to consider these, *Screws* v. *United States*, 325 U. S. 91, 107 (1945) (opinion of Mr. Justice Douglas); *United States* v. *O'Connor*, 237 F. 2d 466, 472 (2d Cir. 1956). We would reverse the conviction on Count 1 if that were alone. However, since the sentences on the two counts run concurrently, the judgment must stand if the conviction on either count was proper, *Lawn* v. *United States*, 355 U. S. 339, 362 (1958), and we find no sufficient basis for disturbing the verdict on Count 2. Accordingly we affirm.

The government's case to substantiate the charge of concealment of assets from the trustee in Count 1 was this: Early in July, 1955, accountants retained by the Bureau made an audit of Ellen-Joan. The start-off point was an inventory, taken by appellant on January 31, 1955, showing 816 dresses then on hand. The accountants added 13,658 dresses received from contractors (net after returns) between February 1 and June 24, 1955, making a total of 14,474 dresses to be accounted for. Sales (less returns) and dresses on hand on June 24 amounted to only 12,608. This left 1,866 dresses unaccounted for. An officer of the Bureau testified that the shortage was discussed at several creditors' meetings relating to the proposed arrangement;

that Stone first said he did not understand the reported shortage; that Stone's counsel asked for more time to explain this; and that at the creditors' meetings, the last of which was in late October or early November, there was continuous discussion "to clear up this question of the shortage and if that was cleared up they would discuss an adjustment. Otherwise they would entertain only a plan for a hundred per cent." A special agent of the Federal Bureau of Investigation testified that in May, 1957, Stone had told him on two occasions that the only explanation Stone could offer for the missing dresses was that they had been stolen while he was away on business trips. The government offered evidence that the physical arrangement of Ellen-Joan's premises made such a theft unlikely. It showed that the statement of affairs filed in the Chapter XI proceeding on June 24, 1955, answered "No" to Item 13, "Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein?" And an employee of Ellen-Jones testified that during the first half of 1955, he had made two deliveries to customers, totaling between 70 and 126 dresses, on Stone's instructions, for which no charge slips were prepared.

This testimony sufficed to support a finding that the operator of this one-man business had taken property belonging to it. However, the offense of which Stone was charged consists not simply in taking property belonging to the estate but in concealing it from the trustee, who was not appointed until November 17, 1955. It would be unlikely in the last degree that if Stone had taken 1,800 dresses between February 1 and June 24, he would still have had them on November 17. Hence the government's case necessarily rests upon the premise, which indeed defendant does not seem to challenge, that the indictment may be construed as charging concealment of the dresses or their proceeds or, if not, that any variance may be disregarded. See *Gerson* v. *United States*, 25 F. 2d 49 (8th Cir. 1928); *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (7th Cir.), *cert. denied*, 338 U. S. 893 (1939).

However, that is by all odds the easiest problem; the difficult ones are whether there was enough evidence to warrant the jury in finding that Stone still had the proceeds on November 17, and, if so, that he concealed them from the trustee. On the former point we have been told, as to a similar issue concerning turnover orders, that "Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession." *Maggio v. Zeitz*, 333 U. S. 56, 65 (1948). *Hersh v. United States*, 68 F. 2d 799 (9th Cir. 1934) and *Reiner v. United States*, 92 F. 2d 823 (9th Cir. 1937) held the inference impermissible upon the evidence there offered; but the government distinguishes those decisions on their facts, as the Ninth Circuit itself has done in *Noell v. United States*, 183 F. 2d 334 (1950), where, however, the case for drawing the inference was stronger than here. *United States v. Schiro-son*, 116 F. 2d 881, 884 (3d Cir. 1941), is more troublesome for the government in this respect as is *Rizzuto-Gross Co. v. United States*, 20 F. 2d 36 (6th Cir. 1927), whereas *Lacaud v. United States*, 33 F. 2d 582 (6th Cir. 1929), gives it some support. It is debatable whether Stone can properly be said to have practiced a "concealment" from the Bureau as trustee in view of the knowledge the Bureau had acquired on behalf of the creditors in the abortive Chapter XI proceeding, cf. *Hersh v. United States*, *supra*; we suppose he can be since he would be concealing the whereabouts of the property, assuming he had taken the dresses and still had them or their proceeds, even though the trustee was convinced of the taking. Authority is of little aid in cases such as this where slight differences of fact and in the feel of the evidence may be of crucial significance; on the whole we think there was enough evidence to send Count 1 to the jury, *United States v. Feinberg*, 140 F. 2d 592, 594 (2d Cir.), *cert. denied*, 322 U. S. 726 (1944); *United States v. Costello*, 221 F. 2d 668, 671 (2d Cir. 1955), although barely so. However, the defendant was entitled to an instruction clearly placing before the

jury the issue of his possession of some of the property or its proceeds on November 17. Doubtless the judge would have given such an instruction if he had been asked; instead he charged that "evidence of a merchandise shortage permits an inference of guilt", which we deem insufficient on the facts here.

Whether or not the conviction on Count 1 should be reversed on this ground although no proper request was made or exception taken, Fed. R. Crim. Proc. 52(b), it would have to be on the ground of the refusal of defendant's request for the grand jury minutes of his testimony. Stone took the stand in his own defense. Although admitting knowledge of some minor shortages in dresses, he denied that 1,800 were missing, saying this was simply what the accountants told him. The government sought to impeach this testimony by reading Stone the following question and answer from his grand jury testimony:

> "Q. Now, at the time the petition was filed in June of 1955 a shortage of approximately 1,800 dresses was found? A. Yes."

Stone said, "I remember the question and the answer is probably there, but the answer is probably from the accountant who gave it to me." On redirect examination Stone's counsel asked "permission to examine the grand jury minutes at this time for the purpose of only examining the testimony of this gentleman to see what other testimony was given on the same score."; this was refused. We held in *United States* v. *Cotter*, 60 F. 2d 689, 692, *cert. denied*, 287 U. S. 666 (1932) that when the prosecution uses testimony of a defendant before the grand jury, the defendant must be allowed to inspect it. The judge's failure to grant defendant's request is understandable since the request was predicated in part upon a citation of *United States* v. *Hiss*, where the charge was perjury before a grand jury. Despite the inapposite and misleading reference we think the point was sufficiently brought to the Court's attention.

and, both for this reason and because of the plain error rule, the question is whether the refusal was prejudicial. The government says it was not, since the defendant himself supplied the reconciliation between his alleged admission of the loss before the grand jury and his denial of it at the trial, and the minutes would have done no better. We disagree. Inspection of the minutes, a copy of which this Court caused to be submitted to appellant's counsel for comment in his reply brief, reveals *inter alia* the questions and answers reproduced in the margin.[1] We cannot be certain that this objective demonstration of the consistency of Stone's trial testimony with what he had said before the grand jury would not have been far more effective than what the trial jury may well have regarded as an invented and self-serving explanation. See *United States v. Zborowski*, 271 F. 2d 661, 667 (2d Cir. 1959). Indeed, the prosecution should not have opposed defendant's request for the minutes, as the Assistant United States Attorney who argued the appeal frankly conceded.

If the conviction is to stand, it must thus be on the basis of Count 2.

Item 10 of the statement of affairs in the Chapter XI proceeding bankruptcy Form 3, requiring an answer to the question "What repayments of loans have you made during the year immediately preceding the filing of the original petition herein?" To this the statement verified by Stone made the following response:

> "Chemical Corn Exchange Bank & Trust Co., repaid full amount of $10,000.; David Schwartz repaid full amount of $5,000. Sue Brett repaid full amount of $2,000.00; Michael Stone, Secretary, repaid $4,666.00 since February 28, 1955—balance due $3,038.00; all as appear in the books and records"

---

[1] "Q. Did you take an inventory in March? A. From then on I did take inventories and there was always some dresses short, but not to that amount that was recorded there.

"Q. In other words you never discovered a shortage of 1800? A. Not to that amount.

"Q. Can you give us an idea? A. They reported their shortage. Our accountants never reported."

An accountant testified that the books of Ellen-Joan showed three payments to Anita Stone during the year, one of $3,000 on July 19, 1954, another of $2,000 on March 25, 1955 and a third of $220 on May 12, 1955; the government claimed these were repayments of loans[2]. The principal defense was that the amounts recorded as loans by Mrs. Stone were in fact loans from various other persons for whom she acted as a conduit and that the repayments also went to them. We need not consider whether a charge of failure to disclose such repayments would have been an unallowable variance; for the government chose instead to challenge the veracity of the explanation and, although we do not say defendant's story was necessarily incredible, the jury was warranted in rejecting it. Appellant's claim that any failure to include repayment of loans to Mrs. Stone in the answer to Item 10 would have been inconsequential in view of the reference made to the books and accounts, is plainly without merit; the very purpose of the statement of affairs is to give dependable information

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[2] The July 19, 1954 check is endorsed:

Anita Stone
OK for Cash
Anita Stone
Selma Barasch.

Mrs. Stone admitted the first three lines were in her handwriting. Selma Barasch was Ellen-Joan's bookkeeper.

The March 25, 1955 check is endorsed "Anita Stone" in what is concededly her handwriting; underneath her endorsement is a rubber-stamp:

XN FOR DEPOSIT IN XN

The Public National Bank and Trust Company of New York

JERELL JUNIORS, INC.

Jerell Juniors, Inc. was one of the persons from whom Anita claimed to have obtained loans.

The May 22, 1955 check bears the endorsement:

for dy to acct of

Anita Stone

Mrs. Stone denied this was in her handwriting; clearly the handwriting is different from that on the other two checks.

without need of going further.[3] Appellant now makes an argument, not put before the jury, which is quite persuasive as regards the March 25 and May 22 payments. This is that the loan account on the company's general ledger was a single account combining loans payable to Anita and Michael Stone and that analysis shows the two payments to Anita on March 25 and May 12 must have been included in the $4,600.00 recited in the statement of affairs as having been repaid to Michael "since February 28, 1955." However, this affords no explanation of the failure to report the $3,000 payment of July 19, 1954. It is, of course entirely possible that if defendant's counsel had argued the disclosure of the March 25 and May 22 repayments to the jury as he has to us, the jury would not have found defendant guilty for failure to report a single payment made to Mrs. Stone nearly eleven months before; but this we can never know. To reverse because of counsel's belated discovery of this point would go beyond the plain error rule of Fed R. Crim. Proc. 52(b), and we cannot believe the one error to which proper objection was taken, namely, the failure to make the grand jury minutes available, prejudicial as we hold this to have been with respect to Count 1, carried over to the wholly different transactions charged in Count 2 with respect to which the government had made no claim of inconsistent grand jury testimony. Judgment affirmed.

---

[3] See 1 Collier, Bankruptcy, ¶ 7.14, at 994-95 (14th ed. 1956). The requirement, Bankruptcy Act § 7(a)(9), 11 U. S. C. § 25(a)(9), was added by the Chandler Act, 52 Stat. 847 (1938). It had been provided for in the Hastings-Michener bill (H. R. 9068, S. 3866) of 1932.

Opinion of United States Court of Appeals for the Second Circuit on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 242—October Term, 1959.

(Petition for rehearing filed August 1, 1960

Decided October 3, 1960.)

Docket No. 26088

—o—

MICHAEL STONE,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

Before:

LUMBARD, *Chief Judge*, and
HAND and FRIENDLY, *Circuit Judges*.

On Petition for a rehearing.

PER CURIAM:

Stone's petition for rehearing urges that "this Court completely overlooked appellant's argument that this $3,000 payment [of July 19, 1954] did not constitute a 'repayment of loan' which petitioner was required to list in answer to

item 10 of the Statement of Affairs in the Chapter XI proceeding" because the loan account showed an item "Loans—Transferred to Paid in Surplus—August 25, 1954—$10,000" which would have left a balance due to the corporation if the $3,000 item had in fact been the repayment of a loan from Mrs. Stone. Our failure to mention this argument was not because we had overlooked it but rather because it concerned an issue of fact properly for the jury.[1] *Non constat* the $10,000 transfer to surplus recorded on August 25, a balance of more than $3,000 had been owing by the corporation on July 19; the August 25 transfer had evidentiary value as to the character of the July 19 payment but it was not conclusive as appellant now contends. The defense offered as to the $3,000 payment was that, although recorded as a payment to Mrs. Stone, it was in fact a repayment through her of a loan made to the business by one John Ignizio, although Mrs. Stone was unable to recall Ignizio's name and the defendant did so only after considerable wavering. The jury was not bound to accept this and Stone would not have been aided if it had, for, as the government brought out in recross-examination, the statement of affairs showed no repayment of a loan from Ignizio. The gravemen of the offense charged in Count II of the indictment was knowing and fraudulent failure to disclose in the statement of affairs the repayment of loans during the year preceding the filing of the petition, and the allegation that the omitted repayments were of loans from Mrs. Stone was unnecessary, *cf. United States* v. *Hiss*, 185 F. 2d 822, 831 (2d Cir., 1950), *cert denied*, 340 U. S. 948 (1951). Under the charge the jury could have found Stone guilty on the basis that the repayments were of loans from

[1] The statement in the petition that the two payments made to Mrs. Stone on March 25 and May 22, 1955 "could not constitute a basis for petitioner's conviction" is erroneous. What we said was that if the analysis of the evidence made by appellant's counsel in his reply brief in this Court had been put before the jury at the trial, the jury might well have found that these two payments were in fact reported in the statement of affairs.

others, with Mrs. Stone merely a conduit, as well as on the basis that the repayments were of loans made by her; there was sufficient evidence to support a conviction on either basis; and the latter was a permissible variance since the statement as to the lender in the indictment was surplusage, the different version of the facts was offered by the defendant himself and thus plainly did not subject him to unfair surprise, and a conviction on this theory would not deprive him of his right to be protected against another prosecution for the same offense. See *Berger* v. *United States*, 295 U. S. 78, 83 (1935); *Meyers* v. *United States*, 3 F. 2d 379 (2d Cir., 1924); *Mathews* v. *United States*, 15 F. 2d 139 (8th Cir., 1926); *United States* v. *Remington*, 64 F. 2d 386 (2d Cir., 1933); *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (7th Cir., 1949), *cert. denied*, 338 U. S. 893 (1949), *rehearing denied* 338 U. S. 940 (1950). The other contentions in the petition have been sufficiently discussed in our initial opinion.

The petition for rehearing is denied.

Opinion of United States Court of Appeals for the Second Circuit on Further Motion for Reconsideration

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL STONE,

Defendant-Appellant.

Appellant's further motion for reconsideration is denied. The motion to recall the mandate is granted and issuance of the mandate is stayed subject to compliance with Rule 28(c) of this Court.

L. H.,
H. J. F.,
U. S. C. J.J.

(October 17, 1960.)

Sheet No.

Terms

Rating

Credit Limit

NAME A&M Store

ADDRESS

DATE 1958	ITEMS	J.R. ✓	DEBIT	CREDIT	ITEMS
Sept 1	Balance		230 57		
" 8		CD 145		28 48	
" 28		CD 147		1600	Rec'd 4
Rec'd 4		4[illegible] CD 147		300	
		30 52 151		[illegible]	
				[illegible]	
Apr 30		CD 155	140		
" 30		CD 156	800		

Sheet No

Terms

Rating

Credit Limit

NAME A&M Store

ADDRESS

Account No 18

DATE 19 58	ITEMS	FOLIO	DEBITS	DATE 19 58	ITEMS	FOLIO	CREDITS
Feb 1	Balance		230157	Feb 28		2332	1000 —
28		CD 147	1000 —	March 31		333	450000
28		4015 CD 147	300 —				1500 —
March 31		3015 151	320000	March 31		CR 316	4500 —
			551657				455000
Apr 30		CD 155	149 —				
30		CD 155	800 —				

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Office Supreme Court, U.S.
FILED
DEC 1 1960
JAMES R. BROWNING, Clerk

No. 514

In the Supreme Court of the United States

OCTOBER TERM, 1960

MICHAEL STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
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Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 514

MICHAEL STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the Court of Appeals (Pet. 23–34) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1960. A petition for rehearing was denied on October 3, 1960. The petition for a writ of certiorari was filed on November 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the conviction of the petitioner under Count II of the indictment.

Exhibit No. 2

Ledger Sheet.

(See opposite ☛)

2. Whether an error relating to Count I of a two count indictment was so prejudicial as to require reversal of conviction on Count II.

STATUTE INVOLVED

18 U.S.C. 152 provides in pertinent part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or
>
> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding;
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

The petitioner was convicted after trial by jury in the United States District Court for the Southern District of New York under a two count indictment charging violation of 18 U.S.C. 152 (Pet. 24). The first count charged concealment of assets from a trustee in bankruptcy and the second count a false oath in a statement of affairs accompanying a petition for an arrangement (Pet. 24). The petitioner was sentenced to 18 months imprisonment on each count, the sentences to be served concurrently (Pet. 25). On appeal the conviction was affirmed on the second count (Pet. 23–25).

The relevant facts are as follows:

The petitioner was engaged in the dress manufacturing business through the operation of Ellen-Joan Fashions, Inc., a corporation of which he was secretary and a director[1] (Pet. 24, App. 51a–52a, 72a).[2] The petitioner's wife, Anita Stone, was president and sole stockholder of Ellen-Joan Fashions, but took no part in the management or operation of the corporation (Pet. 8, 24, App. 39a–40a). On June 24, 1955, a petition for an arrangement under Chapter 11 of the Bankruptcy Act (11 U.S.C. 701–799) (Pet. 4), was filed on behalf of Ellen-Joan Fashions by the petitioner. The petitioner continued to operate the business until November 17, 1955, when Ellen-Joan Fashions, Inc. was adjudicated a bankrupt and a trustee appointed (Pet. 4).

Count I of the indictment was based on a shortage of dresses worth over $14,000 found on an audit on behalf of the trustee. The person employed by Ellen-Joan Fashions as packer and shipper testified that on at least two occasions he had, on instructions from the petitioner, delivered dresses to buyers without making the charge slips which usually accompanied such deliveries (App. 29a–30a). The Court of Appeals, although not doubting that the jury could properly find the petitioner responsible for the shortage, had some question whether, at the time the trustee was ap-

[1] The petitioner testified that he "regarded Ellen-Joan as my business."

[2] The Appendix to the Government's brief below has been filed with the Court and will be referred to herein as App.

pointed, the petitioner would still have had the missing dresses or their proceeds. On this issue it found that there was barely sufficient evidence to go to the jury. It nevertheless reversed the conviction because of failure to turn over to the petitioner grand jury minutes of his testimony. The petitioner had denied on the stand that there were any dresses missing (App. 64a). On cross-examination, the Government read the petitioner's answer to a question before the grand jury in which he admitted that there was a shortage of dresses (App. 64a, 71a). A request by the petitioner for the grand jury minutes for the purpose of examining his testimony was denied by the court (App. 74a–75a). The grand jury minutes would have shown that the petitioner had stated that he had no knowledge of the alleged shortage until informed of it by the auditor (Pet. 29).

Count II stems from Item 10 of the petition for an arrangement and the accompanying Statement of Affairs filed by the petitioner in behalf of Ellen-Joan Fashions on June 24, 1955 (App. U.S. 2a, 76a–77a). It read as follows:

> 10. *Loans repaid.*
>
> a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein? Chemical Corn Exchange Bank & Trust Co. repaid full amount of $10,000; David Schwartz repaid full amount of $5,000. Sue Brett repaid full amount of $2,000.00; Michael Stone, Secretary.

repaid $4,660.00 since February 28, 1955—balance due $3,038.00;

ALL AS APPEAR IN THE BOOKS AND RECORDS

* * * * *

Mr. Freedman testified that the books of Ellen-Joan Fashions, Inc. showed that on February 1, 1954, there was a balance due to Anita Stone of $1,980. An entry of May 14, 1954, showed a loan from Anita Stone of $10,000 and an entry of August 25, 1954, showed a transfer of $10,000 from the loan account of Anita Stone to paid-in surplus. On March 22, 1955, there was recorded a loan from Anita Stone $1500. (App. 18a–26a).

The payments to Mrs. Stone were by three checks signed by petitioner as follows (App. 79a):

July 19, 1954, Check No. 3394	$3,000
March 25, 1955, Check No. 4198	$2,000
May 12, 1955, Check No. 4638	$ 220

Mrs. Stone testified that she had used the money from the checks to repay the persons who had made loans to the firm through her (App. 41a). She said that she had borrowed large sums of money from various individuals and companies which she had turned over to her husband's firm (App. 40a–42a); that she had no money of her own (Pet. 8, App. 40a). Two thousand dollars came from one Frankel, a dress manufacturer (App. 42a–43a), to whom she said she gave, as evidence of the loan, a check drawn on Ellen-Joan Fashions made payable to her. She could give no explanation of why the check was made payable to her rather than to Frankel and she did not remember whether she had endorsed the check (App. 43a–44a).

She further testified that she had borrowed "about $3,000" from one Nat Grossman "[A]bout five or six years ago" for the petitioner's business, and that no security was given to Grossman, who was not related to either the petitioner or Mrs. Stone (App. 48a–49a). She said that she repaid Grossman with funds from Ellen-Joan Fashions, but that she did not have the check with which he had been repaid (App. 50a). Neither Frankel nor Grossman received interest on the alleged loans. Mrs. Stone also testified that she had borrowed the money from a Mr. Schwarz under similar circumstances (App. 46a, 50a).

The petitioner also testified that his wife frequently borrowed money from her friends and relatives for the use of his company. He insisted that the proceeds from the checks given to Mrs. Stone had been used to repay some of these loans. However, he was unable to specify which loans had been repaid by Mrs. Stone.

On appeal, the petitioner argued for the first time that payments to Anita Stone in the amount of $2,200 were included in the $4,600 listed as repayments of loans to Michael Stone, and justified this by the fact that loan accounts of Michael Stone were combined in the company ledger in a single account (Pet. 31).

The Court of Appeals held that failure of the petitioner to argue this point at the trial foreclosed its consideration on appeal. The court further held that the error in not permitting the petitioner to view the grand jury testimony did not prejudice petitioner with respect to Count II.

On petition for rehearing, the petitioner urged that inasmuch as the books reflected a transfer of $10,000 from the Stones' loan account to paid-in surplus, in August, 1954, there was no amount due from Mrs. Stone, so that there was no basis for believing that the $3,000 check (given in July, 1954, before the transfer of account) was a repayment of a loan, because Ellen-Joan Fashions did not owe Mrs. Stone any money (Pet. 33). The court held that this was a question of fact which should have been presented to the jury and was not properly before the court on appeal. The petition for rehearing was denied.

ARGUMENT

1. The contention that the evidence is insufficient to support the evidence on Count II is without merit. The government presented, in addition to the Statement of Affairs prepared by the petitioner, the testimony of the auditor (whose competence the petitioner does not question) that the payments to Mrs. Stone were repayments of loans. This testimony was based upon the books and records kept by the petitioner's company, for whose management the petitioner was solely responsible.

The attempted explanation at the trial, by both the petitioner and his wife, that the moneys represented repayments to lenders who had given the money to the wife, in itself supported the interpretation of the books as reflecting repayments of loans. The jury could properly regard them as such. See *Radin v. United States*, 254 F. 2d 45, 49 (C.A. 6), certiorari

denied, 357 U.S. 930; *United States* v. *Rosenberg*, 195 F. 2d 653, 655–656 (C.A. 2). Since, even on this explanation offered by the petitioner and his wife, the statement of affairs did not properly reflect payments of loans, the jury could properly find that the petitioner's oath was both false and knowingly so.

The fact that after conviction the petitioner thought of other explanations to account for the payments reflected in the books does not show that the jury was wrong in accepting what the books reflected and what the petitioner and his wife themselves indicated the books reflected—repayments of loans. Moreover, the fact that, with respect to this one-man business, a new explanation of the repayments was attempted on appeal and, when that failed, a totally inconsistent theory was offered on rehearing (see the Statement, *supra*) hardly carries conviction as to the merits of the new theories.

2. In the light of the very different evidence which supports Count II as against the evidence with respect to Count I, the Court of Appeals properly found that the error in failing to turn over the grand jury testimony as to Count I did not necessitate reversal as to Count II. It is true that the court found that as to one item of his testimony—the petitioner's statement as to his awareness of the shortage of dresses—his testimony before the grand jury was not inconsistent with his testimony at the trial. But even as to Count I, this consistency did not serve to counteract other testimony that the petitioner must have known of and caused the shortage. As to the loans involved in Count II, as set forth above, the attempted explana-

tion which both the petitioner and his wife offered at the trial to the effect that repayments to the wife were in fact repayments to other lenders in itself was an admission that the statement of affairs was false. Under these circumstances, any consistency in the petitioner's testimony with respect to the dresses could not affect the facts showing the falsity of the statements as to loans. The error as to Count I thus did not infect Count II.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1960.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 514

MICHAEL STONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Government on page 2 of its memorandum says:

> "2. Whether an error relating to Count I of a two count indictment was so prejudicial as to require reversal of conviction on Count II."

In arguing the point in question at page 8, the solicitor general's brief reads:

> "The fact that after conviction the petitioner thought of other explanations to account for the payments reflected in the books does not show that the jury was wrong in accepting what the books reflected and what the petitioner and his wife themselves indicated the books reflected—repayments of loans.

Moreover, the fact that, with respect to this o[ver]-man business, a new explanation of the repayments was attempted on appeal and, when that failed, a totally inconsistent theory was offered on rehearing (see the Statement, supra) hardly carries conviction as to the merits of the new theories."

The attention of the Court is called to the fact that in the decision of Court of Appeals for the Second Circuit, that Court said:

"Whether or not the conviction on Count 1 should be reversed on this ground although no proper request was made or exception taken, Fed. R. Cr. Proc. 52 (b), it would have to be on the ground of the refusal of defendant's request for the grand jury minutes of his testimony. Stone took the stand in his own defense. Although admitting knowledge of some minor shortages in dresses, he denied that 1,800 were missing, saying this was simply what the accountants told him. The government sought to impeach this testimony by reading Stone the following question and answer from his grand jury testimony:

"Q. Now, at the time the petition was filed in June of 1955 a shortage of approximately 1860 dresses was found? A. Yes."

The Court then says:

"We disagree. Inspection of the minutes, a copy of which this Court caused to be submitted to appellant's counsel for comment in his reply brief, reveals inter alia the questions and answers reproduced in the margin. We cannot be certain that this objective demonstration of the consistency of Stone's trial testimony with what he had said before the grand jury would not have been far more effective than what the trial jury may well have regarded as an invented and self-serving explanation.

See United States v. Zborowski, 271 F. 2d 660, 667 (2d Cir. 1959). Indeed, the prosecution should not have opposed defendant's request for the minutes.

as the Assistant United States Attorney who argued the appeal frankly conceded.

If the conviction is to stand, it must thus be on the basis of Count 2."

At page 364 of the minutes of the trial there appears the following:

"The Court: There is no such intimation. He has explained it in the way it has been explained.

Mr. Palmer: Then I take an exception to your not giving the minutes only of the witness on the stand.

The Court: All right, I have ruled. Please continue."

Again turning to the brief for the United States in opposition, that brief quotes as follows (p. 8):

"It is true that the court found that as to one item of his testimony—the petitioner's statement as to his awareness of the shortage of dresses—his testimony before the grand jury was not inconsistent with his testimony of the trial. But even as to Count I, this consistency did not serve to counteract other testimony that the petitioner must have known of, and caused, the shortage. As to the loans involved in Count II, as set forth above, the attempted explanation which both the petitioner and his wife offered at the trial to the effect that repayments to the wife were in fact repayments to other lenders in itself was an admission that the statement of affairs was false."

An examination by the jury of the books of the Bankrupt marked in evidence would have disclosed the fact that there was a full page of items of loans and exchange accounts, but the jury stated on page 481, of the record, of the trial the following:

"The Court: Well, I will read this note. They want all exhibits excepting books, and the indictment.

There is a period after books, so I suppose they want the indictment. Get those ready then.

Any objection, Mr. Palmer?

Mr. Palmer: No, no objection.

The Court: Get the exhibits which are in the form of papers rather than books and then mark this as a court exhibit.

(Marked Court Exhibit 1.)"

Under the circumstances, the jury who could have seen that the itemization in the statement of affairs which referred plainly and in large caps to the fact as per the books of account that there was such a hetrogeneous mass of items, that Michael Stone in connection with his answer to these questions could not have any possible intention of misleading the jury or misleading the creditors.

As a matter of fact, the testimony plainly discloses the fact that immediately after the petition was filed and a meeting of creditors was called at the New York Credit mens' Association, all of these records, books, etc., were turned over to the creditors and their accountant who admitted that these items appeared in the books so turned over to him, who took over possession of the Ellen Jose Fashions, Inc. Under these circumstances, is it proper to believe that if a conviction on the first count to the concealment of assets would have been set aside if there was no second count, on which the punishment to sustain a verdict on the second count was not similar to the punishment meted out on the first count, that such a conviction would have stood? Is it not prejudicial that the verdict on the second count, which was used to sustain the verdict on the first count would not have been sustained if it were not for the fact that the jury had found, from the expressions of the Court, the District Attorney and the references to the Grand Jury minutes concerning the testimony of Michael Stone at that point showed that he was a person who had perjured himself before the Grand Jury and had attempted in the District Court to wheedle him-

out of the alleged position that he had taken before the Grand Jury? Does what happened to bring about the sustaining of the verdict on the first count have no bearing on the subject of prejudicial error? Can it be said that the jury while remaining in session and there were women on the jury, up to 10:10 P. M., on Friday night, were not prejudiced by the fact of that alleged perjury before the Grand Jury, that the atmosphere that permeated the jury room concerning the defendants' guilt or innocence was not influenced by the improper direction of the Trial Court to refuse the minutes of that Grand Jury of Michael Stone's testimony to his counsel. Even the Circuit Court of Appeals, as noted above, after the hearing of the argument on the appeal, decided that the Grand Jury's minutes should be shown to the defendant's counsel so that the brief offered to the Court after the consideration of these minutes should include the error complained of.

The same testimony discloses the fact that the jurors came back again to the court at 5 P. M., and the following took place:

> "The Court: I received this note at approximately 5 P. M.:
>
> 'We would like to have the court reporter read the whole testimony of Mr. Stone.'
>
> Mark this as a court exhibit.
>
> (Marked Court's Exhibit 2.)
>
> (Jury present.)
>
> The Court: Mr. Foreman, I have your note in which you ask apparently for the reading of the whole testimony of Mr. Stone. Do you want the colloquy or just the testimony?
>
> The Foreman: Well, as we figured it out, the testimony. I don't know how long it would take, but if you think you could cut it down—
>
> The Court: It will probably take quite a bit of time, but that is all right. We will read the testimony and leave out the colloquy then. Do you want the colloquy? That is the argument of the lawyers.

The Foreman: No, just the testimony.

(Testimony read.)

The Foreman: I was going to say that perhaps the jury did get the meat of what they wanted. How can I find out if they did?

The Court: Well, you can ask them and they can say yes or no here.

The Court: Does anybody want more?

(Jurors indicated it was sufficient.)

The Foreman: I think we found out what we were really after.

The Court: All right then. Very well. You may retire.

(At 5:45 P. M. the jury retired and continued its deliberations.)"

The jurors again were confronted with the testimony given by Michael Stone wherein there was a repetition of the fact that he had changed his story as told by him regarding the shortage of merchandise as he told it before the Grand Jury and as he told it to this jury—the trial jury. This emphasized again the proposition which was told to the jury by the Judge at pages 476-477:

"If any witness has wilfully testified falsely to any material fact, you may disregard all his testimony or you may accept such part of it as you believe worthy of belief—as appeals to your reason or judgment. Remember always, it is the quality of the evidence that counts.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility if any, as you may think it deserves.

The credibility of a witness is solely for you, the jury, to decide."

Whether there was sufficient evidence to support the conviction of the petitioner under Count II of the indictment.

In that connection, petitioner bitterly contests the statement made on page 3 of its brief reading as follows:

> "The person employed by Ellen-Joan Fashions as packer and shipper testified that on at least two occasions he had, on instructions from the petitioner, delivered dresses to buyers without making the charge slips which usually accompanied such deliveries (App. 29a-30a.)"

Mr. Whitted, the person in question, testified as follows at pages 188-189:

> "The Court: By the way, I assume when you took these goods, these dresses to Stan Rose, you got no receipt?
>
> The Witness: Yes, I got a receipt.
>
> The Court: You got a receipt?
>
> A. I got a receipt.
>
> Q. And whenever you took merchandise anywheres else would you get a receipt? A. That's right.
>
> Q. In other words, you get a receipt for the amount of merchandise you bring over. A. That's right."

On page 190:

> "Q. So far as you are concerned, do you know of the fact that in that building that you were in there were a lot of thieveries? A. Yes, but not on the premises where I was working at.
>
> Q. Well, the thieveries that took place in the building—
>
> The Court: Are you going to testify?
>
> Mr. Palmer: Not yet.
>
> The Court: Well, ask questions then.
>
> Q. Were there other dress concerns in the building? A. Yes.

Q. And to your knowledge were there burglaries of dresses in the building from time to time? A. Yes, there were burglaries." (Pages 188-189 of record of case on trial)

With regard to the statement concerning Mr. Freedman, accountant for the creditors, at page 5 of the Government's brief, indicates the fact that he was not an expert as claimed by the Government. To indicate his admitted errors, there appears the following in the cross-examination of Mr. Freedman by Mr. Palmer (This is the Mr. Freedman, who, on page 7, the Government says [whose competence the petitioner does not question]. This remark is ironical and not in accordance with the facts.):

"Q. Well, didn't you say yesterday, in response to a question, that there were three alleged discrepancies and finally you came down, it lasted for a while and then finally you came down to one discrepancy? Didn't you say that yesterday? A. There were three classes of inventory in which I found discrepancies and then with the work of Mr.

Q. You did use the word 'discrepancy'?

The Court: Let him finish.

A. Then after consultation and working with Mr. Stone, he was able to prove to my satisfaction that two of them were correct, not that the discrepancies were correct, but the inventory reconciliation ties up with the inventory on hand.

Q. You used the word 'discrepancy.' I didn't use it when you were on the stand. A. That's right.

Q. Which, after talking to Mr. Stone, which were you satisfied were not discrepancies any longer? A. The piecegoods?

Q. Yes. A. Piecegoods, and the cut lots sold to contractors and received from contractors.

Q. Now, as to the piecegoods, did you claim in the first instance that there was 11,000 yards short according to your rough calculation? A. I would have that in my work papers because once an error is found or is corrected from further information I make the changes immediately.

Q. I know but the error that was found was an error on your part, not his part, is that correct? A. Right.

Q. Now, so far as you are concerned, after you talked to him and checked back, with all these men, etc., etc., you discovered the fact that these errors were errors on your part, correct? A. Not mathematical errors. Errors of interpretation of the facts." (pp. 134-135 of the record of cases on trial)

And as to the statement made at page 6 of the Government's brief concerning the contention that the petitioner argued for the first time that the payments to Anita Stone in the amount of $2,200 were included in the $4,600 listed as repayments of loans to Michael Stone, and justified this by the fact that loan accounts of Michael Stone were combined in the company ledger.

It is interesting to note:

"Appellant now makes an argument, not put before the jury, which is quite persuasive as regards the March 25 and May 22 payments. This is that the loan account on the company's general ledger was a single account combining loans payable to Anita and Michael Stone and that analysis shows the two payments to Anita on March 25 and May 12 must have been included in the $4,600.00 recited in the statement of affairs as having been repaid to Michael 'since February 28, 1955.' However, this affords no explanation of the failure to report the $3,000 payment of July 19, 1954. It is, of course, entirely possible that if defendant's counsel had argued the disclosure of the March 25 and May 22 repayments to the jury as he has to us, the jury would not have found defendant guilty for failure to report a single payment made to Mrs. Stone nearly eleven months before; but this we can never know." (Circuit Court of Appeals - decision p. 45)

Yet, as to that particular statement, it is interesting to note that there was submitted to that Court on the rehearing, the following:

> "It was then respectfully submitted to that Court that it had overlooked appellant's argument that this $3,000.00 did not constitute a repayment of the loan which petitioner was required to list in answer to Item 10 of the Statement of Affairs in the Chapter XI proceeding. It was there mentioned to that Court that there was nothing in the Court's decision concerning that the analysis of the testimony of the Government's principal witness, David Freedman, and an examination of the books and records of the corporation showed that this payment to Anita Stone could not possibly have constituted a repayment of a loan. The Court also was shown that according to Government's Exhibit 22B, Government's Appendix 79A, the net balance due to Anita and Michael Stone from the corporation was the sum of $608.43 and the next item in that Exhibit affecting Anita Stone is a loan to the corporation by Anita Stone on May 14, 1954 in the sum of $10,000.00. On July 19, 1954 there then appears a payment to Anita Stone of $3,000.00. Finally, there appears the following statement at the bottom of the column entitled 'Additional Funds loaned to Company': 'Loans—Transferred to Paid in Surplus—August 25, 1954 . . . $10,000.00.' The journal entry in the books of the Corporation with respect to this last transaction as testified to by Mr. Freedman, showed that this sum of $10,000.00 was transferred from Loans Payable—Anita Stone to Paid in Surplus (R. 113, Appendix 34A, 35A.) Mr. Freedman testified that this transaction left an amount due from Anita Stone to the Corporation of $1,020.00. On the basis of this testimony and these entries in the books and records of the Corporation, it would be impossible to say the $3,000.00 paid to Anita Stone as a payment on loan since the $10,000.00 loaned by Anita Stone to the corporation on May 14, 1954 was transferred intact to Paid in Surplus.

> Now, if the $3,000.00 payment to Anita Stone had been applied in reduction of this $10,000.00 loan, this transaction could not have been so recorded since there would not have been $10,000.00 in the Anita Stone loan account to transfer to Paid in Surplus.
>
> In view of the uncontradicted testimony that Michael Stone was a general all-around salesman for the Corporation, had no knowledge of bookkeeping, had no knowledge of how the transaction involved in the conduct of his business were recorded, including the loan accounts, pro and con, and in view of the uncontradicted testimony that the schedules were prepared from information given by the bookkeeper of the defendant directly to the office of the attorney for the Bankrupt, how can it possibly be said that this transaction proved perjury on the part of Michael Stone."

Under these circumstances, with the accountant, Mr. Freedman, making these admissions as to his own errors of interpretation, can not this error of interpretation go to the question of his interpreting that the $10,000.00 put in the business by Anita Stone and later on charged to Paid in Surplus, must have proved that the $3,000 was properly accounted for on the books, and that there was insufficient evidence to support the conviction of the petitioner under Count 2 of the indictment. This decision itself based upon the theory of theoretic concealment is in violation of the decisions of the Supreme Court of the United States.

Does not the language of this Court in the *Kotteakos v. United States*, 66 S. Ct. 1239, at 1248; 328 U. S. 750, state truly represent the right on the part of this defendant for a new trial wherein the question of the prejudices created against him in the trial at large cannot exist:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the jury

ment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Respectfully submitted.

ARCHIBALD PALMER,
Attorney for Petitioner.

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Section 152, Title 18, U. S. C. 1

Supreme Court of the United States

OCTOBER TERM 1960

No: 514

MICHAEL STONE,

Petitioner.

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to reconsider its denial of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's conviction on two counts of an indictment, charging violations of Section 152, Title 18, U. S. C.

POINT I

The instant case does not come within the rule that a judgment of conviction on a multicount indictment will stand if the conviction under any of the counts is sufficient to support the judgment.

Petitioner submits that in denying his petition for a writ of certiorari, this Honorable Court may have been swayed by the line of cases which hold that ordinarily a judgment of conviction will stand if the conviction under

any of the counts is sufficient to support said judgment and the sentence thereunder. Petitioner is of the opinion that if he had indicated to this Honorable Court that there is a clear distinction to be drawn between this line of cases and the instant case, this Court would have granted his petition for a writ of certiorari.

Thus, the writer has examined most of the cases which enunciate this well-established rule and found that, in each instance, the error which would have necessitated a reversal of the conviction on one of the counts of the indictment pertained only to the evidence adduced in support of that particular count of the indictment. In the instant case, however, the admitted prejudicial error committed by the Trial Court affected the entire case, since the failure to permit the defendant to rehabilitate himself by the use of the entire Grand Jury minutes, after his improper impeachment by the prosecuting attorney, had the ultimate effect of (1) tainting the defendant's entire testimony given at the trial and of supplying the elements of willfulness and fraudulent intent required to be proven by the prosecution; and (2) depriving the defendant of a fair trial.

In examining the myriad of cases cited in support of the proposition that if one count of the indictment is sufficient in itself to support the judgment, error occurring in another count of the indictment will not necessitate a reversal, the writer was unable to discover a single case in which the error complained of involved the character and credibility of the testimony of the defendant. The error in each of these cases was limited in its effect to one particular count of the indictment and did not infect the evidence adduced in support of the other counts of the indictment.

Cf: *Lawn* v. *U. S.*, 355 U. S. 339; 78 S. Ct. 311;
Hulahan v. *U. S.*, 214 Fed. 2d 441;
Gantz v. *U. S.*, 127 Fed. 2d 498;
Bowen v. *U. S.*, 153 Fed. 2d 747;
Hausbrough v. *U. S.*, 156 Fed. 2d 327.

In the instant case, however, the error necessarily affected the jury's appraisal of the credence to be given to defendant's testimony under both counts of the indictment and could not be insulated to the first count, in connection with which the error was committed. The case most nearly akin to the instant case is *U. S. v. Samuel A. Carmel*, 267 Fed. 2d 345, in which the defendant was indicted under three counts of an indictment charging him with theft of two automobiles and a conspiracy to commit these offences. In reversing defendant's conviction on all counts, the Court of Appeals held that in view of the fact that all the evidence presented a close case to the jury, the unjustified and extensive intervention of the Trial Judge constituted prejudicial error, and the Court of Appeals made no attempt to determine the effect of this prejudicial error upon the individual counts of the indictment. In the instant case, it has been shown that the Court of Appeals found that there was barely enough evidence to send Count 1 to the jury and that the prejudicial error committed by the Trial Court would have necessitated a reversal of this count if it stood alone. With respect to Count 2 of the indictment, the Court of Appeals stated that petitioner had made a quite persuasive argument as respects two of the three payments in question, and that it is entirely possible that if the disclosure of these two payments had been argued to the jury, the jury would not have found defendant guilty for failure to report a single payment made nearly eleven months before.

Thus, it is apparent that the facts in the instant case presented a close case to the jury and that any prejudicial error committed at the trial might easily have affected the jury's final determination.

In the case of *McDonald, et al. v. U. S.*, 335 U. S. 451, 69 S. Ct. 191, this Honorable Court held that the error committed in the admission of illegal evidence against one of several defendants cannot be isolated to that defend-

ant and required the reversal of the conviction of all defendants. To the same effect see:

McKnight v. *U. S.*, 183 Fed. 2d 977, 979;
Nelson v. *U. S.*, 208 Fed. 2d 505.

In the latter case, the Court found that the denial of the defendant Nelson's motion to suppress infected the cases of the other appellants since all were tried jointly and that the Court did not and, as a practical matter, could not limit the jury's consideration of the unlawfully seized evidence to the defendant Nelson alone.

This zealousness to protect the interests of additional defendants whose interests may have been affected by prejudicial error which involves only one of the defendants should, petitioner submits, extend to the instant case where the prejudicial error infected both counts of the indictment equally, against a sole defendant.

POINT II

The decision of the Court of Appeals in the instant case is in conflict with the Court of Appeals for the Sixth Circuit and with its own prior decisions.

There is even a conflict of decisions with respect to the rule stated above that where a defendant is convicted on two or more counts of an indictment and concurrent sentences are imposed, the judgment will stand if the conviction under any of the counts is sufficient to support the conviction and judgment thereunder. Thus, the Court of Appeals for the Sixth Circuit, in the case of *Robinson* v. *U. S.*, 30 Fed. 2d 25, reversed all four counts of an indictment, although the convictions upon these four counts were affirmed, stating, at pages 29 and 30, as follows:

> "Thus we develop a single trial upon nine counts, with a single verdict of guilty, and a finding of no error as to four counts, and reversible error as to

five. Under the circumstances of this case, the imprisonment sentence upon the four counts having been deemed by the trial judge to be appropriate punishment also for the five, we are not clear that the sentence as to the four ought to stand and at the same time a new trial be had as to the five. See Blitz v. U. S., 153 U. S. 308, 318, 14 S. Ct. 924, 38 L. Ed. 725; Ballew v. U. S., 160 U. S. 187, 203, 16 S. Ct. 263, 40 L. Ed. 388; Putnam v. U. S., 162 U. S. 687, 714, 16 S. Ct. 923, 40 L. Ed. 1118; Johnson v. U. S. (C. C. A. 7), 215 F. 679, 684, 687, L. R. A. 1915A, 862. The intimation to the contrary in De Jianne v. U. S. (C. C. A. 3), 282 F. 737, 742, does not seem to be supported by the cases therein cited.

The convictions and sentences upon the first five counts are reserved, the convictions upon the last four counts are affirmed, but the sentences thereon are reversed, and the case is remanded for further proceedings * * *."

Even the Court of Appeals for the Second Circuit has found that this is not a hard and fast rule and in the case of *U. S. v. Hines*, 256 Fed. 2d 561, stated at page 563, as follows:

"Putting aside, however, what appears to be error in holding the Claassen rule controlling in cases of this sort, the Supreme Court has made it clear that the rule is not a hard and fast one, but rather a matter of discretion. For at least on one occasion it reversed convictions on some counts of a multicount indictment where concurrent sentences had been imposed. Putnam v. United States, supra, 162 U. S. 687, 16 S. Ct. 923. See also Robinson v. United States, 6 Cir., 30 F. 2d 25, and United States v. DiCanio, 2 Cir., 245 F. 2d 713, certiorari denied DiCanio v. United States, 355 U. S. 874, 78 S. Ct. 126, 2 L. Ed. 2d 79 * * *."

It is therefore respectfully submitted that the decision of the Court of Appeals in the instant case not only conflicts with the decision of the Court of Appeals for the Sixth Circuit in the *Robinson* case, cited *supra*, but also conflicts with its own decision in the case of *U. S. v. Hines*, cited *supra*.

POINT III

The jury's consideration of Count 2 of the indictment was clearly affected by the errors committed by the Trial Court.

The Court of Appeals said that it would have reversed the conviction on Count 1 if it stood alone. It is petitioner's contention that the jury would never have convicted petitioner on Count 2 if Count 1 was not submitted to the jury tainted by the prejudicial error because:

1. The jury did not look at the books and records because it was convinced of defendant's guilt on Count 1 by reason of the prejudicial error above mentioned;

2. Without this prejudicial error the jury could not have been so convinced of his guilt, and would have examined the books and records as requested, and would have found that there was nothing concealed and that petitioner was innocent of Count 2.

Since the Court of Appeals in its decision stated: "• • • we cannot believe the one error to which proper objection was taken, namely, the failure to make the grand jury minutes available, prejudicial as we hold this to have been with respect to Count 1, carried over to the wholly different transactions charged in Count 2 • • • ", may not the following be considered as a further proper ground for this Court to grant the writ of certiorari prayed for on this rehearing: On page 76a of the government's Appendix there is only a portion of the statement of affairs included (govt's Exhibit 1), which portion is item 10 and item 13 of the statement of affairs. (Item 13 was not attacked in the indictment. The defendant duly testified that the person who prepared the schedules could not answer in the affirmative as to thefts in the premises, because there was no proof of the same to submit to the police department or the insurance company.) Item No. 14 is not

included. Annexed hereto is a copy of the entire statement of affairs (govt's Exhibit 1).

The Court is asked to consider item 14, "Withdrawals" (referring to personal withdrawals, including loans, which have been made during the year immediately preceding to officers and directors, etc., which would include Anita Stone) and the answer thereto, "As appear in the books and records" in light of the fact that those books and records disclose fully the Anita Stone and other loan accounts; those books and records are in evidence; the jury refused to examine those books and records and so informed the Court.

This shows that the jury's mind must have been affected by the prejudicial error of the Court as herein complained of and the overruling of defendant's counsel's objection to charge No. 10 in the form set forth, as requested by the District Attorney (Appellant's App. 108a, 109a), which reads as follows:

> "The statement contained in item 10 of the statement of affairs in the petition in proceedings under Chapter 11 of Ellen-Joan Fashion Co. was material as a matter of law."

This charge as requested did not take into consideration item No. 14, which according to the statement of affairs would include Anita Stone as president and director of the corporation nor the language of Count 2 itself. The jury therefore must have given its attention solely to item No. 10.

This is plainly shown in another way. When the jury came back to court at the beginning of its 8 hour session, it said it did not want the books of account. Apparently the Judge's charge and the argument concerning the submission of the Grand Jury minutes to defendant's counsel had so affected the minds of the jurors at large, that once they had come to the conclusion of finding him guilty on one count of the indictment, that there was no necessity

further to delve into the books and records with respect to Count 2.

It is earnestly contended that if the Court had not accentuated item 10 and obliterated item 14 in the eyes of the jury, which latter item applies to the same transactions, then the jury would have found that there was no wilful withholding of any information concerning Anita Stone, who according to the Government's accountant had put $10,000 more into this sinking business which had been earmarked as capital investment.

CONCLUSION

It is respectfully submitted that on this petition for rehearing, this Honorable Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioner.

Dated: New York, January 10, 1961.

Certification of Attorney

I hereby certify that the foregoing petition is filed in good faith and not for delay and that the petition is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court of the United States.

ARCHIBALD PALMER.

Government's Exhibit 1

Statement of Affairs.

(See opposite ☛)

Official Form No. 3

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
71 BROADWAY AND 1 RECTOR ST., NEW YORK

STATEMENT OF AFFAIRS

EXHIBIT 2

(For Bankrupt or Debtor Engaged in Business.)

(NOTE:—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, or section 622 of chapter XIII.)

1. Nature, location and name of business.

a. What business are you engaged in? (If business operations have been terminated, give the date of such termination.) Manufacturing and selling dresses

b. Where, and under what name, do you carry on such business? No. 1375 Broadway, New York 18 New York under name of ELLEN-JOAN FASHIONS, INC.

c. When did you commence such business? February, 1952

d. Where else, and under what other names, have you carried on business within six years immediately preceding the filing of the original petition herein? (Give street addresses, the names of any partners, joint adventurers, or other associates, the nature of the business, and the periods for which it was carried on.)

None

2. Books and records.

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein? (Give names, addresses, and periods of time.) Rose Cassano, 2137 - 72nd St., Brooklyn, N.Y. since Jan. 1955; prior thereto Selma Darasch, 1166 Grant Avenue, Bronx, New York City

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein? (Give names, addresses, and dates of audits.) Louis Klutz, 49 West 37th St., New York, New York, for past year; prior thereto Goldberg & Gilbert, 132 East 43rd St., New York, New York

c. In whose possession are your books of accounts and records? (Give names and addresses.) Petitioner's at No. 1375 Broadway, New York 18 New York

3. Financial statements.

a. Have you issued any financial statements within the two years immediately preceding the filing of the original petition herein? (Give dates, and the names and addresses of the persons to whom issued, including mercantile and trade agencies.) In December, 1954 to National Credit Association, 135 Broadway, New York City

4. Inventories.

a. When was the last inventory of your property taken? June 21, 1955

b. By whom, or under whose supervision, was this inventory taken? Michael Stono

c. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.) Approx. $3,100.00, at cost

d. When was the next prior inventory of your property taken? March 30, 1955

e. By whom, or under whose supervision, was this inventory taken? Michael Stono

f. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.) Approx. $15,000.00

g. In whose possession are the records of the two inventories above referred to? (Give names and addresses.) No record kept

5. Income other than from operation of business.

a. What amount of income, other than from the operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein? (Give particulars, including each source, and the amount received therefrom.)

None

6. Income tax returns.

a. Where did you file your last federal and state income tax returns, and for what years? For 1954 - Federal 487 Lexington Ave., New York City; State at Albany New York

7. Bank accounts and safe deposit boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein? (Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)

Chemical Corn Exchange Bank & Trust Company, 38th Street and Seventh Avenue, New York, New York - signature of Michael Stono, Secretary

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein? (Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and, if surrendered, when surrendered, or, if transferred, when transferred and the name and address of the transferee.)

None

8. Property held in trust.

a. What property do you hold in trust for any other person? (Give name and address of each person, and a description of the property and the amount or value thereof.)

None

is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, or section 622 of chapter XIII.)

---

1. Nature, location and name of business.

a. What business are you engaged in? Manufacturing and selling dresses
(If business operations have been terminated, give the date of such termination.)

b. Where, and under what name, do you carry on such business? No. 1375 Broadway, New York 18 New York under name of HELEN-JOAN FASHIONS, INC.

c. When did you commence such business? February, 1952

d. Where else, and under what other names, have you carried on business within six years immediately preceding the filing of the original petition herein? (Give street addresses, the names of any partners, joint adventurers, or other associates, the nature of the business, and the periods for which it was carried on.)

None

2. Books and records.

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein? (Give names, addresses, and periods of time.) Lobo Cabbuteo, 2124 - 72nd St., Brooklyn, N.Y. since Jan. 1955 prior thereto Selma Barasch, 1166 Grant Avenue, Bronx, New York City

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein? (Give names, addresses, and dates of audits.) Louis Hunts, 49 East 37th St., New York, New York, for past year; prior thereto Goldberg & Gilbert, 152 East 43rd St., New York, New York

c. In whose possession are your books of accounts and records? (Give names and addresses.)

Petitioner's at No. 1375 Broadway, New York 18 New York

3. Financial statements.

a. Have you issued any financial statements within the two years immediately preceding the filing of the original petition herein? (Give dates, and the names and addresses of the persons to whom issued, including mercantile and trade agencies.)

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b. By whom, or under whose supervision, was this inventory taken? Michael Stono

c. What was the amount, in dollars, of the inventory? Approx. $3,100.00, at cost
(State whether the inventory was taken at cost, market, or otherwise.)

d. When was the next prior inventory of your property taken? March 30, 1955

e. By whom, or under whose supervision, was this inventory taken? Michael Stono

f. What was the amount, in dollars, of the inventory? Approx. $15,000.00
(State whether the inventory was taken at cost, market, or otherwise.)

g. In whose possession are the records of the two inventories above referred to?
(Give names and addresses.)

No record kept

5. Income other than from operation of business.

a. What amount of income, other than from the operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein?
(Give particulars, including each source, and the amount received therefrom.)

None

6. Income tax returns.

a. Where did you file your last federal and state income tax returns, and for what years? For 1954 - Federal 487 Lexington Ave., New York City; State at Albany New York

7. Bank accounts and safe deposit boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?
(Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)

Chemical Corn Exchange Bank & Trust Company, 38th Street and Seventh Avenue, New York, New York - signature of Michael Stono, Secretary

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?
(Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and, if surrendered, when surrendered, or, if transferred, when transferred and the name and address of the transferee.)

None

8. Property held in trust.

a. What property do you hold in trust for any other person?
(Give name and address of each person, and a description of the property and the amount or value thereof.)

None

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
71 BROADWAY AND 1 RECTOR ST., NEW YORK

STATEMENT OF AFFAIRS—Continued

9. ***Prior bankruptcy or other proceedings; assignments for benefit of creditors.***

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein? (Give the location of the bankruptcy court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)

None

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee? (If so, give the name and location of the court, nature of the proceeding, a brief description of the property, and name of receiver or trustee.)

No

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein? (If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

No

10. ***Loans repaid.***

a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein? (Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the bankrupt or debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and, if so, the relationship. If the bankrupt or debtor is a corporation, state whether the lender is or was a director, officer or stockholder, or a relative of an officer, director or stockholder, and, if so, the relationship.) **Chemical Corn Exchange Bank & Trust Co. repaid full amount of $10,000.; David Schwartz repaid full amount of $5,000. Sue Brett repaid full amount of $2,000.00; Michael Stone, Secretary, repaid $4,660.00 since February 28, 1955 - balance due $3,038.00; ALL AS APPEAR IN THE BOOKS AND RECORDS**

11. ***Transfer of property.***

a. What property have you transferred or disposed of other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

None

12. ***Accounts receivable.***

a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of assignees.) **Accounts assigned to Amherst Factors, Inc. 835 Avenue of Americas, New York City**

13. ***Losses.***

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein? (If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)

No

(If the bankrupt or debtor is a partnership or corporation the following additional questions should be answered.)

14. ***Withdrawals.***

a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original petition herein? (Give name of each person, whether partner, officer, director or manager, the dates and amounts of withdrawals, and nature or purpose thereof.)

As appear in the books and records

15. ***Members of partnership; officers, directors, managers, and principal stockholders of corporation.***

a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent. or more of the issued and outstanding stock, of the corporation? **Anita Stone, President, directors and stockholder - 1947 19 Lane, Brooklyn, New York; Michael Stone, Secretary, Treasurer and director, 1947 19 Lane, Brooklyn, New York.**

KLEIN-JOAN FASHIONS, INC.

.....
[or Debtor]

By .....
Secy.

State of X County of ..... ss.:

I, XXXX

charge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)

None

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee? (If so, give the name and location of the court, nature of the proceeding, a brief description of the property, and name of receiver or trustee.)

No

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein? (If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

No

10. Loans repaid.

a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein? (Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the bankrupt or debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and, if so, the relationship. If the bankrupt or debtor is a corporation, state whether the lender is or was an officer, director or stockholder, or a relative of an officer, director or stockholder, and, if so, the relationship.) Chemical Corn Exchange Bank & Trust Co. repaid full amount of $10,000.; David Schwartz repaid full amount of $5,000. Sue Brett repaid full amount of $2,000.00; Michael Stone, Secretary, repaid $4,660.00 since February 28, 1955 - balance due $3,038.00; ALL AS APPEAR IN THE BOOKS AND RECORDS

11. Transfer of property.

a. What property have you transferred or disposed of other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

None

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a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of assignees.) Accouhts assigned to Amherst Factors, Inc. 855 Avenue of Americas, New York City

13. Losses.

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein? (If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)

No

(If the bankrupt or debtor is a partnership or corporation the following additional questions should be answered.)

14. Withdrawals.

a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original petition herein? (Give name of each person, whether partner, officer, director or manager, the dates and amounts of withdrawals, and nature or purpose thereof.)

As appear in the books and records

15. Members of partnership; officers, directors, managers, and principal stockholders of corporation.

a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent. or more of the issued and outstanding stock, of the corporation? Anita Stone, President, directors and stockholder - 1947 19 Lane, Brooklyn, New York; Michael Stone, Secretary, Treasurer and director, 1947 19 Lane, Brooklyn, New York.

ELLEN-JOAN FASHIONS, INC.

.....
[Bankrupt or Debtor]

State of X County of ss.:

By _____ Secy.

I, , affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this day of , 19

.....
Bankrupt [or Debtor]

.....
[Official character]

State of New York County of New York ss.:

MICHAEL STONE, being duly sworn, deposes and says that he is the Secretary of ELLEN-JOAN FASHIONS, INC., the bankrupt [or debtor] named in the foregoing statement of affairs and is duly authorized to make said statement on its behalf, and that the answers therein contained are true and complete according to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this 24th day of June, 1955

.....
[Official character]